COMMUNICATION OF THE COMMISSION ON CERTAIN LEGAL ASPECTS CONCERNING INTRA-EU INVESTMENT

(97/C 220/06)

(Text with EEA relevance)

1. INTRODUCTION

1. Over the past decade, the importance of intra-EU investment has increased enormously throughout the EU and extended to many sectors of the economy. Undoubtedly, the creation of the Single Market has played a major role. Confronted with this situation, some Member States have felt it necessary to introduce several measures in order to monitor, and in some cases control, this important development.

In this context, the Commission, in its institutional role, is closely following the situation in order to ensure that some of these measures do not constitute obstacles to investment coming from other EU Member States. Some of them, introduced in the past, are enshrined in general laws concerning exchange control regulations, private company regulations, etc., while some others have been introduced more recently in the context of privatization programmes undertaken over the last few years by some Member States [1]. Since such measures could generate restrictions on free circulation at the cross-border level, they may raise compatibility problems with EU legislation, in particular, with Articles 73b and 52 of the Treaty concerning the freedom of capital movements and the right of establishment, and hinder the functioning of the Single Market.

2. Since this is a complex matter and given the difficulties that could arise in the interpretation of the provisions of the Treaty concerning these two basic freedoms in the context of intra-EU investment, the Commission has considered it necessary to issue the present Communication. The objective is to indicate, to national authorities and economic operators in Member States, how the Commission interprets the provisions of Articles 73b and 52 of the Treaty on capital movements and the right of establishment in this context, notably on the basis of the well-established case law of the Court of Justice. This will help to reduce the risk of divergent legal interpretation and will thus, on the one hand, enable Member States to shape their policy, by also taking into account Community law in a framework of transparency and mutual trust, and, on the other hand, allow the Community operators concerned to be aware of their rights stemming from the Treaty on intra-EU investment. However, this Communication does not prejudge the interpretation that could be given in this field by the European Court of Justice.

2. THE RELEVANT TREATY PROVISIONS

3. The relevant Treaty provisions governing the freedom of capital movements are enshrined in Articles 73b and ff. In particular, Article 73b of the Treaty provides that 'all restrictions on the movement of capital between Member States shall be prohibited'. This means that all restrictions, both those of a discriminatory (i.e. applied only to other EU investors) and those of a non-discriminatory character (i.e. applied to nationals and to other EU investors alike) are not allowed. In order to be aware of the scope and extent of this provision in practical terms, one can consult Directive 88/361/EEC [2] which, adopted before the introduction of Article 73b, is a useful source for interpretation. Its Annex I contains a list of all kinds of transactions that are to be considered as capital movements. In this list, there are two transactions which are relevant to the subject covered by this Communication: those transactions classified under the heading 'Acquisition ... of domestic securities ...' and those under 'Direct investments ...'.

In the Directive, the heading 'Acquisition ... of domestic securities ...' includes, among others, the transaction 'acquisition by non-residents' of shares and bonds in domestic companies on pure financial investment grounds, that is, without the aim of exerting any influence in the management of the company. Thus, this transaction is considered as a form of capital movement. It is also usually known in the financial literature as 'portfolio investment'.

In a similar way, in the Directive, the heading 'Direct investments' is defined as 'investments of all kinds ... which serve to establish or to maintain lasting and direct links between the person providing the capital and the ... undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest sense ... As regards ... the status of companies limited by shares, there is

[1] It should be stressed, in this respect, that the movement of a firm from the public to the private sector is an economic policy choice which, in itself, falls within the exclusive competence of Member States, stemming from the principle of neutrality in the Treaty *vis-à-vis* the system of property ownership, established in Article 222.

[2] OJ No L 178, 8. 7. 1988, p. 5.

participation in the nature of direct investment where the block of shares held by a person ... enables the shareholder ... to participate effectively in the management of the company or in its control'. Thus, the acquisition of controlling stakes, as well as the full exercise of the accompanying voting rights, in domestic companies by other EU investors is also considered to be a form of capital movement.

4. At the same time, the acquisition of controlling stakes in a domestic company by an EU investor, in addition to being a form of capital movement, is also covered under the scope of the right of establishment. In this sense, Article 52 of the Treaty, governing the right of establishment, provides that 'restrictions on the freedom of establishment of nationals of a Member State in the territory of another member States shall be abolished ... Freedom of establishment shall include the right to set up and manage undertakings, under the conditions laid down for its own nationals'. Thus, nationals of other EU Member States should be free to acquire controlling stakes, exercise voting rights and manage domestic companies under the same conditions laid down in a given Member State for its own nationals (i.e. the application of the 'national treatment' principle to other EU investors).

Respect for the 'national treatment' principle prohibits both direct and indirect discrimination: this means that Article 52 entails not only the prohibition of direct and explicit discriminations on grounds of nationality ([3]), against other EU investors, but also the prohibition of any other national measure which, by means of any other criterion, could lead eventually to the same effect ([4]).

5. Although the rights of establishment and of free capital movements are among the fundamental freedoms of the Treaty, exceptions to the general rules mentioned above in points 3 and 4 exist that allow Member States to introduce restrictions:

(i) Firstly, discriminatory restrictions against other EU investors could be accepted if they were applied to those activities which, in the Member State concerned, are connected, even occasionally, with the exercise of official authority (Article 55). On the same lines, this special treatment for other EU investors could also be accepted if it were based on grounds of public policy, public securtiy or public health (Article 56). However, and according to European Court of Justice jurisprudence, these exceptions have to be understood in a narrow sense (as opposed to an extensive one) and exclude any interpretation based on economic considerations ([5]).

In its turn, Article 73d (1), permits Member States 'to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.' Paragraph 2 also permits the application of restrictions on establishment which are compatible with the Treaty. Paragraph 3, nevertheless, affirms that all these exeptions shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital.

Moreover, restrictions introduced under the legal cover of these exceptions have to pass the proportionality test as provided for by European Court of Justice jurisprudence. The proportionality test means that the restriction in question constitutes a necessary measure to assure the protection of the grounds mentioned above (i.e. public policy, public security, etc.) and, at the same time, there is (are) no other measure(s) which, while achieving the same results, is (are) less restrictive for the freedom concerned ([6]).

On the same lines, it is relevant to remember in this context that the provisions contained in Article 223 allow Member States to take measures they consider necessary for the protection of the essential interest of their security which are connected with the defence sector. However, the Court of Justice pointed out that Article 223 covers only exceptional and clearly defined cases. Because of its limited character, this article does not lend itself to a wide interpretation and it is not possible to infer from it that there is inherent in the Treaty a

([3]) This interpretation is based on different rulings of the ECJ (see, for example, Judgment of 15 March 1988, Frontistiria, Case 147/86, ECR 1988, p. 1637, paragraph 5 and ff).

([4]) See, for example, Judgment of 12 April 1994, Halliburton, Case 1/93, ECR 1994, p. I-1137, paragraph 15, and Judgement of 13 July 1993, Commerzbank, Case 330/91, ECR 1993, p. I-4017, paragraph 14.

([5]) See Judgment of 14 May 1993, Federación de disribuidores cinematográficos, Case 17/92, ECR 1993, p. I-2239, paragraph 16.

([6]) See Judgment of 14 December 1995, Sanz de Lera, Joined Cases C-163/94, C-165/94 and C-250/94, ECR 1995, p. I-4821, paragraph 23.

general proviso covering all measures taken for reasons of public security.

(ii) Secondly, as far as non-driscriminatory measures are concerned, it is important to underline that the case law of the Court of Justice has recently confirmed that 'national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective that they pursue; and they must not go beyond what is necessary in order to attain it' ([7]).

3. COMPATIBILITY ANALYSIS OF SOME OF THE EXISTING RESTRICTIONS

6. In the light of the legal framework described in the previous section, the Commission has analysed several measures existing in the national regulations and laws of certain Member States from the point of view of their compatibility with EU legislation, in particular, the free movement of capital and the right of establishment. These measures can be classified under two different categories: those with a discriminatory character (i.e. applied exclusively to investors from another EU Member State) and those with a non-discriminatory character (i.e. applied to nationals and other EU nationals alike).

7. Among those included in the first category, that is discriminatory measures, are the prohibition on investors from another EU country acquiring more than a limited amount of voting shares in domestic companies and/or having to seek authorization for the acquisition of shares beyond a certain threshold. These kind of measures are considered as restrictions on direct investment operations carried out by investors from another EU Member State. Moreover, since the authorization procedures could be used to restrain investors from buying non-controlling stakes for portfolio investment purposes above the established thresholds, they can also be considered as restrictions on portfolio investment operations. Therefore, the Commission considers that these measures are contrary to Articles 73b and 52 of the Treaty, unless they are covered by one of the exceptions mentioned above in point 5i (i.e. public policy, public security, public health and defence).

([7]) See Judgment of 3 February 1993, Veronica, Case C-148/91, ECR 1993, p. I-0487, paragraph 9; Judgment of 31 March 1993, Kraus, Case 19/92, ECR 1993, p. I-1663, paragraph 32; Judgment of 30 November 1995, Gebhard, Case 55/94, ECR 1995, p. I-4165, paragraph 37; and, Judgment of 15 December 1995, Bosman, Case 415/93, ECR 1995, p. I-4921, paragraph 104.

8. Among those included in the second category, that is measures applied without distinction to all investors, are, in particular:

— general authorization procedures whereby, for example, any investor (EU and national alike) wanting to acquire a stake in a domestic company above a certain threshold,

— the rights given to national authorities, in derogation of company law, to veto certain major decisions to be taken by the company, as well as the imposition of a requirement for the nomination of some directors as a means of exercising the right of veto, etc.

Without prejudice to the exceptions foreseen in the Treaty, these measures ([8]) could present several problems.

As far as general authorization procedures are concerned, these can only be considered as compatible with Articles 73b and 52 if they can be justified by imperative requirements in the general interest and are based on a set of objective criteria, stable over time and made public ([9]), without which they could be implemented in such a way that control of the firm in question remains in the hands of national operators. As the Court has indicated as a general principle, the fundamental freedoms recognised by the Treaty cannot be rendered illusory and exercising these rights cannot be submitted to the discretion of the administrative authorities, which an authorization procedure would imply ([10]).

As far as the the rights given to national authorities to veto certain major company decisions are concerned, it should be noted that the very concept of direct investment, as indicated in Directive 88/361/EEC, covers 'investments of all kinds ... which serve to establish or to maintain lasting and direct links between the person providing the capital and the undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its

([8]) Of course, it would not be a question here of cases where the State holds a controlling stake.

([9]) In the sense of reducing to a minimum the discretion of national authorities.

([10]) See, in particular, Judgment of 31 December 1984, Luisi e Carbone, Joined Cases C-286/82 and 26/83, ECR 1984, p. 0377-0409, paragraph 34 and Judgment of 23 February 1995, Bordessa, Joined Cases 358/93 and 416/93, ECR 1995, p. I-0361, paragraphs 24 to 26, as well as Judgment, Sanz de Lera, paragraphs 24 and 25). The ECJ considers that the 'margin of manoeuvre' contained in these authorization procedures could render the freedom illusory.

widest sense... As regards the status of companies limited by shares, there is participation in the nature of direct investment where the block of shares held by a person enables the shareholder to participate effectively in the management of the company or in its control'. The Court of Justice has consistently maintained, that national measures liable, as is the case for the right of veto in question, to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they mut be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective that they pursue; and they must not go beyond what is necessary in order to attain it.

Moreover, in some cases, several of these measures are coupled with so-called 'national interest' considerations as a basic criterion for their use. Although 'national interest' considerations are often linked to theoretically non-discriminatory measures such as the granting of authorization, this criterion does not appear to be sufficiently transparent and could, thereby, introduce an element of discrimination against foreign investors as well as legal uncertainty. Furthermore, this concept could encompass both economic and non-economic criteria going well beyond the exceptions mentioned above in point 5 and the narrow interpretation given to them by the European Court of Justice. Under these circumstances, the Commission could not accept that the 'national interest' concept as a criterion could, in itself, be used as a legal cover for the measures mentioned above.

4. CONCLUSION

9. The analysis undertaken above concerning measures having a restrictive character on intra-Community investment has concluded that discriminatory measures (i.e. those applied exclusively to investors from another EU Member State) would be considered as incompatible with Articles 73b and 52 of the Treaty governing the free movement of capital and the right of establishment unless covered by one of the exceptions of the Treaty. As regards non-discriminatory measures (i.e. those applied to nationals and other EU investors alike), they are permitted in so far as they are based on a set of objective and stable criteria which have been made public and can be justified on imperative requirements in the general interest. In all cases, the principle of proportionality has to be respected.

10. In the light of the considerations developed above, the Commission will enter into a continuing dialogue with Member States in order to identify difficulties which could create obstacles to the free movement of capital as well as the freedom of establishment. It will ensure that the fundamental freedoms of the Treaty can be realized in a harmonious manner.